

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	

**Comments regarding the FCC NOTICE OF PROPOSED RULEMAKING**

**“Protecting and Promoting the Open Internet”**

**from European Telecommunications Network Operators’ Association**

***I. Introduction***

ETNO, the European Telecommunications Network Operators’ Association, has 50 members and observers in 35 countries. Its members are the main drivers of broadband in Europe, representing 70% of total EU telecoms sector investment and continuing to invest in the face of challenging economic conditions. ETNO member companies develop technological and commercial solutions that contribute to a dynamic Internet ecosystem and deliver fixed and mobile broadband Internet to EU citizens and businesses in support of the objectives of the Digital Agenda for Europe.

The debate on the open Internet is global and advanced policy discussions are taking place both in Europe and the US. In Europe, ETNO is closely following discussions on the European Commission’s proposal for a draft ‘Connected Continent’ Regulation, which *inter alia* seeks to provide guarantees for a dynamic open Internet while at the same time allowing for continued innovation and differentiation in networks and services.

Although we see some commonalities between the European and US debate on open Internet principles, it is not ETNO’s intention to take a position on the specificities of the US debate and the legal and regulatory conditions underpinning it. Instead, we avail of this opportunity to set out high level principles which we believe should form part of any policy approach to the Open Internet. Further, we would like to respond to the FCC’s specific request for clarification on its analysis of the European legal framework on the Open Internet (para 40, NPRM).

***II. Principles for an Open Internet Framework***

**ETNO is fully committed to the open Internet** and believes that consumers should be able to access the services, applications and content of their choice. Indeed, our customers expect access to all content, services and applications at the best possible quality and price, and operators ensure that they provide

transparent, meaningful and comparable information on user access. ETNO believes that achieving the objectives of **openness and transparency should be a matter of concern to players at all levels of the Internet value chain**, not only those at the network access level.

It has been ETNO's long-held view that telecoms operators should be able to manage their networks efficiently while ensuring that consumers enjoy current and new and advanced services online. **Network management is necessary for proper, secure and reliable service delivery**. As stated by the European Commission, *"it is widely accepted that network operators need to adopt some traffic management practices to ensure an efficient use of their networks and that certain IP services, such as for instance real-time IPTV and video conferencing, may require special traffic management to ensure a predefined high quality of service"*.<sup>1</sup>

ETNO notes that the FCC in paras 110 ff. of the NPRM proposes a case-by-case approach to traffic management and service differentiation, aimed at *"encourage[ing] individualized negotiation and, if necessary, a mechanism to allow the Commission to evaluate challenged practices on a case-by-case basis."* This is in our view a pragmatic, appropriate and future-proof way forward. We will refrain from commenting in detail on the proposed standard of "commercially reasonable" practices. However, overall we believe that European policy makers engaged on the open Internet debate should take good note of the FCC's proposals in this section. In particular, the avoidance of rigid, technical limitations to traffic management in a fast-evolving digital environment is superior to attempts in Europe to legislate on a restrictive list of cases, beyond which operators would not be allowed to use any traffic management in the future.

Any rules on the open Internet should strive to safeguard flexibility and support innovation in networks. ETNO believes that **legacy regulation conceived for the PSTN-based telecoms world is not appropriate for the Internet** and should not be the basis for rulemaking in relation to the open Internet.

More generally, it is paramount that policy/legal frameworks should promote investment across the Internet economy and as such, **open Internet rules should not have an investment-chilling effect nor undermine growth**. All of today's economies critically depend on continued investment and innovation in broadband infrastructure to enhance opportunities for all, bring wide-ranging societal benefits and to drive improvements in healthcare, education and energy.

### **III. Situation in Europe**

The European market presents exciting opportunities for telecom operators, but also significant challenges. While Europe was once a leader in the fixed and wireless technologies that comprise the backbone of the digital economy, many markets in Asia and North America now enjoy higher penetration of high-speed fibre access and LTE penetration that is as much as 35 times higher than that of Europe as whole. It is estimated that up to 750 billion euro in GDP growth and as many as 5.5 million jobs in the EU economy are at risk by 2020 because of the lack of next generation network investments<sup>2</sup>. The EU policy framework that foresees cost-based access to fixed networks for third parties as well as fragmented policies on spectrum allocation and assignment across the EU Member States is in large part responsible for this investment gap.<sup>3</sup>

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<sup>1</sup> Cf. **European Commission, European Commission Communication on the open internet and net neutrality in Europe**, p. 3 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0222&from=EN>

<sup>2</sup> **Boston Consulting Group report: Reforming Europe's Telecoms Regulation to Enable the Digital Single Market, July 2013** [https://www.etno.eu/datas/publications/studies/BCG\\_ETNO\\_REPORT\\_2013.pdf](https://www.etno.eu/datas/publications/studies/BCG_ETNO_REPORT_2013.pdf)

<sup>3</sup> **Idem**, p. 20ff.

Nonetheless, Europe's consumers benefit from a vibrant communications networks and services environment. As the example of IP TV has demonstrated in the past, investments in new and enhanced 'next generation' broadband networks will serve to benefit the 'best effort' Internet as well as new managed and differentiated services and will spur further innovation. Fast and reliable access to the open Internet is and will remain the pivotal communication service for end-users and the focal point for consumers' choice of provider. Transparent information to end-users on the characteristics of their Internet access service makes this an effective choice, underpinning Internet openness.

Next to market dynamics, European regulators play an important role in protecting users' rights and freedom of choice as well as guarding against anticompetitive discrimination in the market place. For example, the body of European regulators, BEREC, is monitoring market developments in detail and has recently set out a common approach on quality measurement for Internet Access services, fostering consistency of approaches among national regulators.<sup>4</sup>

### **III.a Commercial Practices in EU markets**

The FCC makes some comments on the European situation and has invited clarifications (paragraph 40). In particular, we noted the statement that *"commenters note more instances of broadband providers engaging in some level of restriction in Europe than the Commission has witnessed in the United States under its open Internet policies."*

The evidence of traffic management cited by FCC was handed by ISPs to their regulator for the survey undertaken by BEREC and based on 2011 data (a total of 414 operators responded - 266 fixed and 148 mobile operators). BEREC found<sup>5</sup> that VoIP or IP messaging is restricted in several mobile contracts and there are restrictions regarding peer-to-peer traffic (at all times or peak times) in certain mobile contracts. It is useful to note that the market has since evolved, especially as regards the inclusion of VoIP in Internet access offers. The legal background also differs from the US. Contracts that limit access to some applications such as VoIP in their terms and conditions, usually for low-value tariff plans, are permitted under Articles 1 § 3 of the Universal Services Directive 2002/22/EC. These terms and conditions are established in a transparent way, and other unrestricted tariffs exist in the marketplace and can be availed of by end users who choose to have an unrestricted plan. As such, we would like to caution against an assessment that European ISPs adopt or have adopted widespread practices that are harmful to consumers. Moreover, **far-reaching transparency rules ensure that there is no 'hidden' degradation in services or blocking practices.**

ETNO therefore believes that the specific FCC comment *"broadband providers [are] engaging in specific restrictions such as traffic degradation as well as blocking and throttling"* is overly broad. There was a very public and isolated case of ad-blocking by one operator in France and a dispute related to the explosion in traffic load for a particular application (the iPlayer in the UK) dating back several years, however these cases were settled quickly. It is important to note that the concept of **no blocking / no throttling is now undisputed in the EU political process** and that the use of tariffs which limit access to certain Internet apps or services will cease to be relevant going forward.

We also would like to draw attention to the reflections in footnote 92 regarding a report by VON: *"The report [by VON] noted that in 2012, a U.K.-based mobile [ISP] contractually limited users from using services*

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<sup>4</sup> **BEREC Draft Report Monitoring Quality of Internet Access Services in the Context of Net Neutrality**

[http://berec.europa.eu/files/document\\_register\\_store/2014/3/BoR%20\(14\)%2024%20Draft%20BEREC%20Report%20on%20NN%20QoS%20Monitoring%20Report.pdf](http://berec.europa.eu/files/document_register_store/2014/3/BoR%20(14)%2024%20Draft%20BEREC%20Report%20on%20NN%20QoS%20Monitoring%20Report.pdf)

<sup>5</sup> **BEREC Findings on Traffic Management Practices in Europe**

[http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/45-berec-findings-on-traffic-management-practices-in-europe](http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/45-berec-findings-on-traffic-management-practices-in-europe)

not affiliated with the ISP, including Internet-based streaming services, voice, peer-to-peer file sharing, or Internet-based video. In fact, the VON report<sup>6</sup> merely quotes terms and conditions which stated that video streaming is most likely to lead to a violation of the provider's fair use policies because of high data volumes.

### **III.b EU Debate on Specialized Services**

We note that in the NPRM, the Commission recognises (paragraph 60) that broadband providers may offer "specialized services" over the same last-mile connections used to provide broadband service. The FCC suggests that it should maintain its approach of continuing to closely monitor the development of specialized services to ensure that broadband providers are not using them to bypass the open Internet rules or otherwise undermine a free and open Internet and seeks comment on this point and some related questions. We believe that the FCC chooses a future-proof path by not formally defining "specialized services". By contrast, the open Internet rules that the European Parliament voted to adopt in a 1<sup>st</sup> reading in April 2014 included a **specific definition for "specialized services" judged impracticable by many operators and observers.**<sup>7</sup>

ETNO takes this opportunity to underline that specialized services, as set out in the European Commission's proposal for a Regulation, would not negatively affect the general quality of Internet Access offers on the market and that regulators would be tasked with monitoring the impact of specialized services on Internet access offers in the market. ETNO believes that in any event, end-users should not be impeded by regulation from choosing to use specialized services.

**ETNO has deep concerns about the direction taken by the European Parliament** in its 1<sup>st</sup> reading on the open Internet provisions of the draft Connected Continent Regulation. We believe that the European Parliament's text puts in jeopardy services that are provided today to broadband users, and prevents operators from managing their networks efficiently. Should 'specialized services' be defined at EU level, such a definition would have to be future-proof and not attempt to define technical characteristics that will be subject to changes in the near future.

Overall, **EU regulators are of the view that there are existing regulatory tools to address any Net Neutrality related concerns**<sup>8</sup>. The body of European regulators, BEREC, has expressed a preference for *"an approach based on principles rather than detailed rules and which provides NRAs with the necessary powers to ensure that those principles [...] are respected"*<sup>9</sup>.

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<sup>6</sup> **Von Report VON Europe - Non-exhaustive Identification of Restrictions on Internet Access by Mobile Operators** <http://www.scribd.com/doc/98641591/VON-Europe-Non-exhaustive-Identification-of-Restrictions-on-Internet-Access-by-Mobile-Operators>

<sup>7</sup> *"An electronic communications service optimised for specific content, applications or services, or a combination thereof, provided over logically distinct capacity, relying on strict admission control, offering functionality requiring enhanced quality from end to end, and that is not marketed or usable as a substitute for internet access service."* **Proposal for a Regulation of the European Single Market for Electronic Communications**, at 242, COM (2013) 627 final (Mar. 26, 2014), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+AMD+A7-2014-0190+237->

<sup>8</sup> **Overview of BEREC's approach to net neutrality, page 3** [http://berec.europa.eu/files/document\\_register\\_store/2012/12/BoR\\_\(12\)\\_140\\_Overview+of+BEREC+approach+to+NN\\_2012.11.27.pdf](http://berec.europa.eu/files/document_register_store/2012/12/BoR_(12)_140_Overview+of+BEREC+approach+to+NN_2012.11.27.pdf)

<sup>9</sup> **BEREC comments on the European Parliament first reading legislative resolution on the European Commission's proposal for a Connected Continent Regulation** [http://berec.europa.eu/eng/news\\_consultations/whats\\_new/2203-berec-publishes-its-views-on-the-european-parliament-first-reading-legislative-resolution-on-the-european-commissions-proposal-for-a-connected-continent-regulation](http://berec.europa.eu/eng/news_consultations/whats_new/2203-berec-publishes-its-views-on-the-european-parliament-first-reading-legislative-resolution-on-the-european-commissions-proposal-for-a-connected-continent-regulation)

As such, ETNO supports their view that **no restrictive legislative rules should be necessary at European level above and beyond reasoned principles**, to be applied on a case-by-case basis by the competent authorities.

#### ***IV Conclusion***

ETNO appreciates this opportunity to restate its support of the open Internet and its commitment to the success of the Internet as an open platform where users have access to any lawful content, application or service of their choice.

As the Internet continues to grow, it is necessary to also reflect on the challenges faced in delivering the types of services and applications that are in demand and with the quality and performance that consumers expect. Therefore, we underline the need for flexibility to accommodate a variety of business models and commercial offers, to allow for increased choice and to address operational issues of network management.

As the US and Europe consider their respective approaches to the open Internet, we urge policy makers to adopt a future-proof path to ensure that the Internet can continue to grow, consumers and all players in the eco-system can continue to benefit, and that those that invest in the underlying infrastructure can continue to do so at the necessary levels to sustain the intense growth of 'Digital' in both economies.